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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-477

RICHARD E. GERSTEIN, State Attorney for the Eleventh Judicial Circuit of Florida, in and for Dade County,

Petitioner,

v.

ROBERT PUGH and NATHANIEL HENDERSON, on their own behalf and on behalf of all others similarly situated,

Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

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Respondents.

RESPONDENTS' SUPPLEMENTAL BRIEF

INTRODUCTORY STATEMENT

This case was originally argued on March 25, 1974. Several weeks later, the Court ordered reargument. Subsequently, the Court invited the Solicitor General of the United States to submit his views on the issues presented, and the Attorney Generals of the fifty states were issued similar invitations.

Nine of the states[1] and the Solicitor General have filed amicus curiae briefs. The Respondents submit this brief to reply to the states' views and to address the questions of mootness and jurisdiction which concerned the Court during the initial argument. In addition, the brief will focus upon the more recent decisions of this Court which are relevant to the case. The views of the Solicitor General, submitted only recently, are addressed in a Second Supplemental Brief for Respondents.

This brief supplements the original arguments submitted by the Respondents. The authorities cited therein retain their validity. The intervening decisions of this Court merely reaffirm that: (1) The Due Process Clause requires preliminary hearings for defendants incarcerated prior to trial solely upon a State Attorney's information; (2) This case is not moot because it is a classic example of the "capable of repetition, yet evading review" exception to the mootness doctrine; (3) *Preiser v. Rodriguez*, 411 U.S. 475 (1973) offers no bar to the maintenance of this action.

Before addressing each of those points, it is important to remind the Court of the factual and procedural background of this case.

THE FLORIDA PROCEDURES WHICH PRESENT THE CONSTITUTIONAL QUESTIONS.

In Florida, criminal actions are usually initiated by informations filed by a state attorney or one of his assistants. The informations are based upon facts

[1] Massachusetts, Georgia, Vermont, Utah, Washington, Louisiana, New Jersey, Texas and California.

presented to the State Attorney's office by police officers (App. 47-50). The filing of an information constitutes a binding determination of probable cause which justifies the detention of a defendant until trial. As the Florida Supreme Court put it:

> When a prosecuting attorney files an information against a defendant, he conclusively determines that the evidence is adequate to establish probable cause to put the defendant on trial.
>
> *State ex rel. Hardy v. Blount*, 261 So.2d 172, 174 (Fla. 1972).

The Florida Rules of Criminal Procedure, Rule 3.131(a) and (b), provide for preliminary hearings for felony defendants if no information is filed within 96 hours after the defendants first appearance. (Accused misdemeants are never entitled to probable cause hearings). The first appearance, which is to set bail and inform the defendant of his rights, takes place within 24 hours of arrest. Rule 3.130, Florida Rules of Criminal Procedure. Thus, a state attorney has at least five days in which to obviate a preliminary hearing by filing an information.[2]

Of course, even if a preliminary hearing is held, and no probable cause found, the state attorney can overrule the magistrate's decision.

[2] Actually a state attorney has at least seven days to act, since Rule 3.040 of the Florida Rules of Criminal Procedure provides that Saturdays, Sundays and holidays are to be excluded in the computation when the period of time involved is less than seven days. The Rules which set the time frames mentioned above were implemented after the District Court decision in this case. At that time, a month or more sometimes passed between arrest and first appearance while the State Attorney was processing the information (App. 56-57, 47-48).

> . . . even if a defendant were granted a preliminary hearing and the committing magistrate discharged the defendant for lack of probable cause, the prosecuting attorney could nevertheless determine that probable cause exists and file an information charging the defendant with the commission of the offense.
>
> *State ex rel. Hardy v. Blount,* 261 So.2d at 174.

The effect of the Rules and Florida Supreme Court decisions is to make state attorneys the final arbiters of probable cause. Absolutely no remedy exists to review a finding of probable cause which flows from an information. The filing of a habeas corpus petition would be futile because the prosecutor's action is conclusive. *State ex rel. Hardy v. Blount,* 261 So.2d at 174. A Motion to Dismiss the information under Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure is unavailing because the State need merely traverse or demur to the Motion and it will be denied. Rule 3.190(d). Consequently, even if one argued that due process is protected by a defendant's ability to initiate a right to be heard on probable cause, the argument would be devoid of merit in the Florida scheme.[3]

The question presented by the Florida practice has

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[3]The Respondents submit that as a due process matter, it is the State, not a defendant, who must initiate the hearing process. If there is a constitutional right to be heard shortly after arrest, then waiver of that right must be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). That waiver cannot be presumed from a silent record. *Carnley v. Cochran,* 369 U.S. 506, 516 (1962). Only if the State makes clear offer of a preliminary hearing can the constitutional standards begin to be met. Compare *Morrissey v. Brewer,* 408 U.S. 471 (1973).

been constant throughout this litigation. Is a person held in custody upon a State Attorney's information constitutionally entitled to a prompt judicial hearing to determine if probable cause exists to deprive him of his liberty?

I.

THE RECENT DECISIONS OF THIS COURT REAFFIRM THE PRINCIPLE THAT DUE PROCESS REQUIRES THAT THE TAKING OF ABSOLUTE LIBERTY BE FOLLOWED BY A PROMPT JUDICIAL HEARING TO DETERMINE PROBABLE CAUSE.

The arrest and incarceration of a person suspected of having committed a crime deprives him of his unencumbered, absolute right to liberty. People convicted of crimes, whose rights to liberty are merely conditional, i.e., parolees and probationers, are entitled to "preliminary hearings" to determine if probable cause exists to consider termination of their parole or probation. *Morrissey v. Brewer,* 408 U.S. 471, 485 (1972), *Gagnon v. Scarpelli,* 411 U.S. 778 (1973). The Respondents, whose claim to liberty is stronger, merely ask for similar treatment.

The Court's recent decisions reinforce the due process contentions made in Respondents' original brief and oral argument.

In *Mitchell v. W.T. Grant Company,* ____ U.S. ____, 94 S.Ct. 1895, 40 L.Ed.2d 406 (May 13, 1974), the Court retreated from the broad rule announced in *Fuentes v. Shevin,* 407 U.S. 67 (1972) which required a

hearing *before* personal property could be temporarily taken. *Mitchell* upheld a Louisiana sequestration statute which provided for hearings immediately *after* the property was seized. The Court took pains to point out that the Louisiana practices offered more protection than did the Florida statutes struck down in *Fuentes*. In the parish where *Mitchell* arose, before a writ of sequestration could be issued:

> . . the requisite showing must be made to a judge and judicial authorization obtained. Mitchell was not at the unsupervised mercy of the creditor and court functionaries. The Louisiana law provides for judicial control of the process from beginning to end. This control is one of the measures adopted by the State to minimize the risk that the ex parte procedure will lead to a wrongful taking. It is buttressed by the provision that should the writ be dissolved there are 'damages for the wrongful issuance of a writ' and for attorney's fees 'whether the writ is dissolved on motion or after trial on the merits.' Art. 3506.
>
> *Mitchell v. W.T. Grant Company*, ____ U.S. ____, 94 S.Ct. at 1904-1905, 40 L.Ed.2d at 419. (footnote omitted).

The Florida procedure for depriving a person of liberty via an information contains none of those safeguards. There is no judicial control over the issuance of the information nor is there judicial review of the information before trial. Damages and attorneys fees are not available upon a finding of no probable cause or an acquittal.[4]

[4]Such damages might be available if one could show a knowing and malicious false arrest. But the cases which are most affected by preliminary hearings are those in which the officer believed he made a valid arrest, only to learn later that he had the wrong person, or a witness no longer could identify him, or that indeed, no actual crime had been committed. Those good faith arrests should not be subjected to civil damage actions. If every discharged arrestee could maintain such suits prosecutors and police would be unable to function. The only remedy for a good faith taking of liberty which is later determined to lack substance is the speedy return of liberty. Only a prompt preliminary hearing can mitigate the potential harm.

At issue in *Mitchell* was personal property (a stove, stereo, refrigerator and a washing machine) in which the buyer and the seller shared interests. The property was never wholly the buyer's. Down payments were made and the vendor transferred possession to the purchaser but retained a right to the goods until payment was completed. Mr. Mitchell had conditional possession of the merchandise. At issue in this case is liberty which is absolutely possessed until the State acts. Certainly, if the taking of the Mitchell property requires an opportunity for an immediate hearing, subsequent to the sequestration, the taking of liberty cannot require less.

Mitchell, Calero Toledo v. Pearson Yacht Leasing, ____ U.S. ____, 94 S.Ct. 2080, 40 L.Ed.2d 452 (May 15, 1974) and *Arnett v. Kennedy*, ____ U.S. ____, 94 S.Ct. 1633, 40 L.Ed.2d 15 (April 16, 1974) all have reaffirmed the need for flexibility in determining what process is due. The Respondents' position respects that concern. As they stated in their original brief, at page 13:

> The Government function involved here is the State's duty to charge and arrest persons suspected of the commission of a crime. An adversary hearing prior to the exercise of that function

might undermine the State's ability to apprehend a suspect. The accommodation which the plaintiffs urge – a prompt hearing subsequent to arrest – protects the Government interest and the private interests, the fundamental right to absolute liberty.

A hearing is mandated by the due process decisions of this Court.

II.

THIS CASE IS NOT MOOT.

A. The "Capable of Repetition Yet Evading Review" Doctrine.

The right to be heard at a preliminary probable cause hearing arises in the time between arrest and trial. In Florida, the speedy trial rule calls for felony cases to be heard within 180 days of arrest and misdemeanors must be called for trial within 90 days. If a demand for a speedy trial is made, the time shrinks to 60 days from the date of the demand. Florida Rules of Criminal Procedure, Rule 3.191(a)(1) and (2). The Respondents and the class they represent contest the State's ability to deprive them of their liberty during that time solely upon a prosecutorial information. Once a trial is held, their claim evaporates.[5] Consequently, the passage of

[5]It is important to reiterate that the Respondents do not claim that a preliminary hearing is a prerequisite to a fair trial. The issue here is whether a pretrial deprivation of liberty may be fairly accomplished without a preliminary hearing. Respondents' Brief, pp. 30-31. The State of Florida and several of the amicus curiae briefs overlook this distinction when they rely upon cases which hold that preliminary hearings are not required by the Due Process Clause. Without exception, those cases involved an attempt to reverse an otherwise valid conviction because a preliminary hearing was denied. That argument has never been made in this case. It is singularly inappropirate because Florida has broad pretrial discovery which enables a defendant to extensively prepare for trial. Florida Rules of Criminal Procedure, Rule 3.220. Thus the focus of this case is narrow. It is concerned only with the pretrial loss of liberty upon an information.

time will invariably prevent a complaining plaintiff from directly benefiting from the hearing he sought. Pugh and Henderson, although they were members of the denied class when they filed their suit in March, 1971, no longer are in need of a preliminary hearing. They have been tried.

This case is a classic example of the "capable of repetition yet evading review" doctrine enunciated in *Southern Pacific Terminal Co. v. I.C.C.*, 219 U.S. 498, 515 (1911). It meets the dual test of the rule.[6] The denial of preliminary hearings continue under the Florida practices. The claims continually evade review because of the short time in which they ripen. The analogy to the *Southern Pacific* progeny, i.e., *Moore v. Ogilvie*, 394 U.S. 814, 816 (1972) and *Roe v. Wade*, 410 U.S. 113, 125 (1973) is apt. In each of those cases the Court found that the issues presented (validity of voter residence requirements and the Texas abortion statute) were "capable of repetition yet evading

[6]See the dissenting opinion of Mr. Justice Marshall in *Richardson v. Ramirez*, ____ U.S. ____, 94 S.Ct. 2655, 2675-2679, 41 L.Ed.2d 551, 557-580 (June 24, 1974). In concluding that the claim was moot, Justice Marshall points to all the reasons which compel the conclusion that Pugh's claim is not moot under the *Southern Pacific* rule.

review." Therefore the Court decided the questions, even though the named plaintiffs no longer suffered the deprivation originally claimed. The plight of those denied preliminary hearings is equally within the evading review doctrine.[7]

There is an additional argument for the mootness exception in the case at bar. It is found in *Sibron v. New York*, 392 U.S. 40 (1968):

> Many deep and abiding constitutional problems are encountered primarily at a level of 'low visibility' in the criminal process – in the context of prosecutions for 'minor' offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct.
>
> *Id.* 392 U.S. at 52-53.

The Respondents and their class would be placed in that quandary if the Court declined to act.

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[7]It may even be a more compelling example. The Fifth Circuit called for the hearings to take place between four and seven days from arrest. *Pugh v. Rainwater*, 483 F.2d 778, 788 (5th Cir. 1973). Every subsequent day without a preliminary hearing gives rise to an irreparable deprivation of liberty. Compare *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972). So it may be said that the time for vindication of the right to be heard is but five to eight days after arrest. A far shorter time than that involved in the voting and abortion cases.

B. The Unnamed Class Members Perpetuate The Controversy.

At the time the Respondents and other intervening plaintiffs filed suit they were part of a class of persons arrested by law enforcement officers in Dade County, Florida who were incarcerated upon informations filed by State Attorney Gerstein and therefore denied preliminary hearings (App. 3). The District Court determined that the case was properly maintained as a class action. *Pugh v. Rainwater*, 332 F.Supp. 1107, 1115 (S.D. Fla. 1971).

Since the Respondents no longer are part of the class, the Court, at oral argument, expressed some doubt about the ability of unnamed class members to perpetuate the controversy in light of *Indiana Employment Security Division v. Burney*, 409 U.S. 540 (1973). (Tr. of Oral Arg. 38-39). See also, *Richardson v. Ramirez*, ____ U.S. ____, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551, 562 (1974). In *Burney*, the named plaintiff's unemployment insurance benefits were terminated without a prior hearing. Several months later she received a hearing in the Indiana Employment Security Division and eventually was reinstated with complete retroactive compensation.

Burney is distinguishable from this case. First, the claims of Mrs. Burney and her class did not evade review. It was possible that the termination of unemployment insurance without a prior hearing could still pose a back payment problem after the post-termination hearing. In order to resolve that dispute the Court would have to address the need for a prior

hearing. Thus, the *Southern Pacific* doctrine was not applicable.[8]

In addition, persons denied pre-termination hearings could eventually be made whole, as was Mrs. Burney. But the effect of a denied preliminary hearing is different. Liberty, once lost, is not retrievable. Money damages, even if appripriate,[9] cannot replace freedom. So the question initially posed by Pugh is very much alive. The present and future members of the class originally represented by the Respondents perpetuate the controversy. They are daily denied an opportunity to be heard. If that opportunity is commanded by the Constitution, only this Court can articulate it and end the dilemma.

III.

PREISER V. RODRIGUEZ, 411 U.S. 475 (1973) POSES NO BAR TO THIS ACTION.

Preiser v. Rodriguez, 411 U.S. 475 (1973) held that when state prisoners challenged "the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, 411 U.S. at 500, with the concomitant requirement of exhausting state remedies." *Wolff v. McDonnell*, ____ U.S. ____, 94 S.Ct. 2963, 2973, 41 L.Ed.2d 935, 949 (June 26, 1974).

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[8] *Richardson v. Ramirez*, ____ U.S. ____, 94 S.Ct. 2655, 2678-2679, n. 12, 41 L.Ed.2d 551, 579-580 (1974) (Mr. Justice Marshall, dissenting).

[9] See footnote 4, *supra*.

The Respondents in this case, proceeding under Title 42 U.S.C. §1983, did not challenge the fact or duration of their confinement. But even if their challenge were read differently and habeas corpus was the proper vehicle, the District Court had jurisdiction since state remedies were non-existent. Therefore exhaustion was not required and the suit could be treated as a habeas corpus petition.

A. There Was No Challenge To The Fact Or Duration Of Confinement.

The Court described the relief sought in *Preiser v. Rodriguez*, 411 U.S. 475 (1973) this way:

> Alleging that the Department had acted unconstitutionally in depriving them of the [good time] credits, they [the plaintiffs] sought injunctive relief to compel restoration of the credits, which in each case would result in their immediate release from confinement in prison.
>
> *Id.* 411 U.S. 476-477.

In *Wolff v. McDonnell*, ____ U.S. ____, 94 S.Ct. 2963, 41 L.Ed.2d 935, the plaintiff similarly sought *inter alia*, "restoration of good time." *Id.* at 2963.

The plaintiffs in *Pugh* never requested relief which would have directly returned their liberty or shortened the duration of their confinement. They asked that the defendants be enjoined:

> from failing to accord plaintiffs and members of their class due process hearings immediately after arrest to determine whether or not probable cause exists for the detention of the plaintiffs and their class. (App. 12).

By granting that relief, the Courts below merely provided a procedural mechanism to test the State Attorney's information. There was no automatic release from confinement flowing from the decisions. Nor did the plaintiffs want the federal court to release them from custody. They did not contend that their custody was illegal. Throughout, they have recognized that the State had the power to arrest and hold them for a short time without a hearing.[10] It was the denial of a hearing which they claimed to be illegal. They wanted only the right to be heard. If, after a preliminary hearing, a State magistrate found no probable cause, the release from custody would be his decision.[11]

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[10] Respondents' Brief, p. 13, Tr. of Oral Arg. 54-55.

[11] In the order which provided for a preliminary hearing plan, the District Court, as a sanction, called for release if no preliminary hearing was granted. *Pugh v. Rainwater*, 336 F. Supp. 490, 493 (S.D. Fla. 1972). But that was merely an enforcement measure which assumed possible non-compliance with the District Court's substantive order. The Fifth Circuit thought the sanctions inappropriate and vacated them. *Pugh v. Rainwater*, 483 F.2d at 790. No one contests that ruling and thus release, in any form, is not an issue here.

Had the Respondents sought habeas corpus relief, the District Court would have been put in the position of ordering many defendants released from physical custody unless preliminary hearings were granted. Not only would that have caused unnecessary federal-state friction, it would have avoided the issue. The pretrial releases would not provide an opportunity to determine probable cause. The defendants then would be in a different form of custody. *Cf. Hensley v. Municipal Court*, 411 U.S. 345 (1973), which would permit them to renew their habeas corpus actions. The only effective relief available then would be for the District Court to order preliminary hearings or outright dismissal of the prosecutions. That gross interference

Unlike the plaintiffs in *Preiser* and *Wolff*, the Respondents custody could only be affected by a State decision on probable cause. Since they sought only the right to be heard, and not the right to liberty, their challenge was not to the fact or duration of their custody and *Preiser* is inapplicable.

B. If *Preiser v. Rodriguez* Is Applicable, the Respondents Have Satisified Its Requirements and This Court Should Act On The Merits.

There is no question that an attempt to seek habeas corpus relief in the Florida courts would be futile. The Florida law is adamant. A prosecutor's information determined probable cause and no preliminary or judicial inquiry of any kind can review that decision. *State ex rel. Hardy v. Blount*, 261 So.2d 172 (Fla. 1972). Florida Rules of Criminal Procedure, Rule 3.131(a). A petitioner need not attempt to exhaust futile remedies. *Preiser v. Rodriguez*, 411 U.S. at 493; *Wilwording v. Swenson*, 404 U.S. 249 (1971). Therefore no jurisdictional barrier prevented the Respondents from maintaining a habeus corpus action in the District Court under Title 28 U.S.C. §2254.

If the Court concludes that habeas corpus is the proper mode of relief, the Court should redesignate this action as a habeas corpus petition and reach the merits

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with state court proceedings would be unnecessary if the form of relief were injunctive. Failure to honor the injunction and provide hearings would subject the State Attorney to contempt proceedings. But the chance of that happening is non-existent, for there can be no doubt that the State Attorneys in Florida will abide by an order of this Court. Therefore a § 1983 action was proper both as a matter of law and as a method of minimizing the federal role.

of the claims. That would be consistent with this Court's statement in *Conley v. Gibson*, 335 U.S. 41 (1957):

> Following the simple guide of Rule 8(f) [Federal Rules of Civil Procedure] that 'all pleadings shall be so constructed as to do substantial justice', we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill in which one mis-step by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.

Id. 355 U.S. at 48.

Choosing the wrong theory of relief does not bar any relief. *Dotschay v. National Mutual Insurance Co.*, 246 F.2d 221, 223 (5th Cir. 1957), 2A *Moore's Federal Practice* § 8.14.[12]

It would even be appropriate to treat the case as a class action habeas corpus under Rule 23(b)(2), Federal Rules of Civil Procedure. *Williams v. Richardson*, 481 F.2d 358, 361, (8th Cir. 1973).

If *Preiser* is pertinent, redesignation is sensible because it will be judicially economical. Since 1971, the *Pugh* case has been the subject of three District Court

[12]Fair notice has been had by all interested parties. Every relevant governmental legal office was represented in the initial phases of this case. The Florida Attorney General's office, the State Attorney's office and the Dade County Attorney's office fully participated in the District Court. On the appeal, only the State Attorney's office contested the preliminary hearing issue. Thus, no interest would be unprotected by the redesignation of the action from a §1983 suit to habeas corpus.

decisions, one Fifth Cicuit ruling and two oral arguments in this Court. Dismissal of the complaint now would result in a habeas corpus petition being filed in the District Court. The same road would be retraced, for ultimately this Court must resolve the questions presented by the Respondents.

IV

THE AMICUS CURIAE BRIEFS OFFER NO THEORY WHICH JUSTIFIES REVERSAL OF THE DECISION BELOW.

Nine of the fifty states accepted the Court's invitation to submit their views on this case. From their briefs, it appears that only one, the State of Washington, shares a pre-trial procedural system which closely resembles Florida's and would therefore be substantially affected by an affirmance. New Jersey and Massachusetts would be unaffected. California and Texas share concern over preliminary hearings for misdemeanants since felony defendants are entitled to probable cause determinations in these states. An affirmance would require several changes in the Vermont procedures for both felony and misdemeanor cases. The extent to which Utah, Georgia and Louisiana would be affected is not clear from their respective briefs.

At the time this brief was prepared for timely submission to the Court, the Solicitor General's arguments had not been filed. On October 1, 1974 a manuscript copy of his brief was provided to

Respondents' counsel. A separate, Second Supplemental Brief is being filed in response to the Solicitor General.

The submitted amicus curiae briefs echo the arguments previously made by Florida. A concern over comity, and reliance upon the early indictment-information decisions are common threads among them. The Respondents have addressed nearly all of those arguments in their original brief, in oral argument, or in this brief. But a short reply to several of the amicus curiae suggestions is necessary.

A. The Comity Issue.

Younger v. Harris, 401 U.S. 37 (1971), is a recurring authority in the briefs of several states. However, each has neglected to accurately assess the scope of the relief sought and the unavailability of state remedies. Those factors make *Younger v. Harris* inapplicable.

Unlike *Younger*, *Samuels v. Mackell*, 401 U.S. 66 (1971) or *Perez v. Ledesma*, 401 U.S. 82 (1971), a declaratory judgment and an injunction compelling preliminary hearings would *not* "effectively stifle the then pending state criminal prosecutions." *Younger v. Harris*, 401 U.S. at 84. The Respondents did not seek a federal determination of probable cause. They asked the federal court to decide if someone other than a prosecutor must determine probable cause. The lower court orders placed the determination in the hands of the state judiciary. Any impact upon state court proceedings would occur only when a state magistrate decided that no valid resaon existed to hold a person

for trial. Consequently, the strictures of *Younger* do not apply to this case.[13]

Even if *Younger* were applicable, the case at hand would be an exception to its principles because: (1) The Respondents cannot be protected in state courts; (2) great and immediate irreparable injury (loss of liberty) is present; and (3) the threatened constitutional deprivation cannot be eliminated by a single defense to the state prosecution.[14] Massachusetts concedes as much when it states: "The amicus curiae would not, however, contend that federal intervention cannot occur where the state proceeding does not allow an individual to raise a federal constitutional claim." Massachusetts Brief, pp. 15-16.

It is uncontroverted that an information is an inviolable determinant of probable cause, *State ex rel.*

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[13]Compare, *Steffel v. Thompson*, ____U.S. ____, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), which permitted a declaratory judgment to be issued against threatened prosecutions. Although no pending action is threatened by an anticipatory declaratory judgment, the final effect is federal foreclosure of a state criminal proceeding. In contrast, *Pugh* poses absolutely no intrusion. State prosecutions, pending or threatened, can always be carried out if the state magistrate finds probable cause.

[14]The mere denial of a preliminary hearing is not a defense to a criminal prosecution. *Scarborough v. Dutton*, 393 F.2d 6 (5th Cir. 1968). Cf. *Coleman v. Alabama*, 399 U.S. 1 (1970). See also, *Bradley v. State*, 265 So.2d 532 (Fla.App. 1972), cert. denied, 411 U.S. 916 (1973). Recognizing those holdings to be sensible, the Respondents never sought to obviate otherwise valid convictions. Florida's broad discovery rules underscore the fact that a fair trial is possible in the absence of a preliminary hearing. For these reasons, the "single defense" which *Younger* contemplates has no meaning when preliminary hearing is denied.

Hardy v. Blount, 261 So.2d 172 (Fla. 1972); *Widener v. Croft*, 184 So.2d 444 (Fla. 1966); Rule 3.131(a), Florida Rules of Criminal Procedure. Massachusetts is in error in suggesting that a motion to dismiss the information for lack of probable cause provides a means of raising the federal claim. Massachusetts Brief, pp. 16-17. The applicable Florida Rule of Criminal Procedure, Rule 3.190(d), mandates that such a motion be denied if the state attorney files a traverse or demurrer under oath. That is nothing more than a reaffirmation of the information which once again terminates probable cause review.

It is obvious that a loss of liberty constitutes irreparable injury. The combination of that injury, the unavailability of state remedies, and the limited federal relief sought, makes the equitable restraint doctrine of *Younger v. Harris* inappropriate in this proceeding.

B. The Right to a Preliminary Hearing is a Constitutional Right.

The amici curiae resist the Respondent's arguments by relying upon *Hurtado v. California*, 110 U.S. 516 (1884); *Lem Woom v. Oregon*, 229 U.S. 586 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914), and some more recent cases in which the information process was never at issue: *Costello v. United States*, 350 U.S. 359, 363 (1956); *Lawn v. United States*, 355 U.S. 339, 349 (1958). A reading of those cases makes it apparent that each of them responded to questions which differ from those posted here. No cases yet

decided by this Court bar the relief sought by the Respondents. On the contrary, the cases which are most closely analogous (and much more recent) present due process and Fourth Amendment principles which firmly support the Respondents' position. *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The amici curiae have failed to distinguish those cases from this one.

Instead, an effort has been made to seek shelter under the Federal Rules of Criminal Procedure which permit informations to determine probable cause in misdemeanor prosecutions. Rule 5(c), Federal Rules of Criminal Procedure. The mere existence of a federal rule does not answer the constitutional issue posed by the Florida practices. If the Respondents are correct, the federal procedures, to the extent that they permit pre-trial incarceration on prosecutorial probable cause, would also be invalid.[15]

The issue in this case has always been: May a prosecutor, by filing an information, deprive a person of liberty for a substantial period of time prior to trial without a hearing? The deprivation of liberty places a defendant in a "'brutal need' situation." *Mitchell v. W.T. Grant Co.*, ____ U.S. ____, 94 S.Ct. 1895, 1909, 40 L.Ed.2d 406, 474 (1974) (Justice Powell, concurring). A few days in jail may result in the loss of a job, loss of home

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[15]See the original Brief for Respondents, pp. 22-26, 31-32, for their arguments regarding misdemeanor preliminary hearings and the impact upon the federal practices.

and car, and family reliance upon welfare.[16] None of the amici curiae have shown a competing governmental interest which overrides the need for a prompt judicial determination of probable cause after arrest.

The Attorney General of Washington hypothesizes that preliminary hearings are not functionally important enough to make them constitutionally "imperative." Washington Brief, p. 18. But that assessment overlooks the positive attributes which flow from preliminary hearings: Early release for innocent people; reduced charges in overstated cases; entry of pleas at an early stage; rapid determination of the need for psychiatric determinations. These, and other reasons, have led the National Advisory Commission on Criminal Justice Standards and Goals to conclude that prompt preliminary hearings should be held in felony cases. *Report on Courts*, Standard 4.5 (1973). This Court has recognized the important functions of preliminary hearings. *Coleman v. Alabama*, 399 U.S. 1 (1970). Even the commentator relied upon in the Washington Brief recognizes that preliminary hearings can play an important and beneficial role in the administration of criminal justice. Anderson, *The Preliminary Hearing – Better Alternatives or More of the Same?*, 35 Mo.L.Rev. 281 (1970). The fear of a diminished prosecutorial role

[16]The Court said in *Baldwin v. New York*, 399 U.S. 66, 73 (1970):

> The prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation.

That comment was reinterated in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

is unfounded. Those officials will continue to make initial determinations to prosecute or to decline to press charges. They will remain the primary screening force. Only after a prosecutor has exercised his option will judicial review become a constitutional necessity.

Finally, an affirmance by this Court will not have an unsettling effect upon the administration of criminal justice. Every jurisdiction has statutes or rules which envision preliminary hearings. Brief for Respondent's Appendix, pp. 1a-2a. Many of the states, including some of the nine which submitted amicus curiae briefs, already provide probable cause hearings to accused defendants. Even if pessimism were a legitimate response to constitutional arguments, such an attitude exhibits an unwarranted lack of faith in our ability to provide justice. Recent experience has shown that the Chief Justice was correct when he wrote in *Argersinger v. Hamlin*, 407 U.S. 25 (1972):

> The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.
>
> *Id.*, 407 U.S. at 44 (Concurring opinion).[17]

As a result of the original decision in this case, Dade County implemented a preliminary hearing plan which resulted in a twenty-five percent reduction in felony caseloads. *Pugh v. Rainwater*, 483 F.2d at 787. Thus the facts of this case compel the conclusion that an affirmance will enhance the efficient administration of criminal justice.

[17]In 1973, seven states adopted full-time, state-wide public defender systems in response to *Argersinger*. National Legal Aid and Defender Association, *Washington Memo*, Vol. III, August 1974, p. 2.

CONCLUSION

For the reasons advanced above and in the original Brief for Respondents, the decision below should be affirmed.

Respectfully submitted,

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